LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 18 1968
S. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. [redacted] 535

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

JOHN G. WAYMAN
W. D. ARMOUR
FRANK W. ITTEL, JR.
REED SMITH SHAW & McCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania
Counsel for The Western and Southern Life Insurance Company, Respondent

Of Counsel:
ITHAMAR D. WEED
400 Broadway
Cincinnati, Ohio

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

	PAGE
Opinions Below	2
Jurisdiction	3
Question Presented	3
Statutes Involved	4
Statement of the Case	6
Reasons for Granting the Writ	9
1. The Board's Procedure and Supplemental Decision Was a Denial of Due Process and Contrary to the Supreme Court's Order	9
Conclusion	16

TABLE OF CITATIONS

CASES

Air Control Products Co. of St. Petersburg Inc., 139 N.L.R.B. 413 (1962)	12
American Enka Corp. v. NLRB, 119 F. 2d 60 (4th Cir. 1941)	14
American Federation of Labor v. NLRB, 308 U.S. 401, 411 (1940)	7
Daw Drug Co., Inc., 127 N.L.R.B. 1316 (1960)	14
Efco Mfg. Inc., 108 N.L.R.B. 245 (1954)	12
Esquire Inc., 109 N.L.R.B. 530, 539 (1954), enf'd. 222 F. 2d 253 (7th Cir. 1955)	12
Father & Son Shoe Stores, 117 N.L.R.B. 1479 (1957)	14
Food Fair Stores, Inc., 114 N.L.R.B. 521 (1955)	14
Local 1976, Carpenters' Union v. NLRB, 357 U.S. 93, 97, note 2 (1958)	13
Metropolitan Life Insurance Co. v. NLRB 328 F. 2d 820 (3d Cir. 1964)	7, 9

Table of Citations.

CASES	PAGE
Metropolitan Life Insurance Co. (Woonsocket) v. Insurance Workers Interntl. Union AFL-CIO 156, N.L.R.B. 1408, 1410 (1966)	8, 10, 13
Metropolitan Life Insurance Co. v. NLRB, 327 F. 2d 906 (1st Cir. 1964)	9
NLRB v. E & B Brewing Co., 276 F. 2d 594 (6th Cir. 1960) cert. denied 366 U.S. 908 (1961)	15
NLRB v. Electric Furnace Co., 327 F. 2d 373 (6th Cir. 1964)	12
NLRB v. Frisch's Big Boy Ill-Mar Inc., 356 F. 2d 895 (7th Cir. 1966)	15
NLRB v. General Motors Corp., 179 F. 2d 221 (2d Cir. 1950)	13
NLRB v. Charles R. Krimm Lumber Co., 203 F. 2d 194 (3d Cir. 1953)	14
NLRB v. May Department Stores, 154 F. 2d 533 (8th Cir. 1946)	14
NLRB v. Metropolitan Life Ins. Co. (Woonsocket), 380 U.S. 438 (1965)	2, 3, 7, 10
NLRB v. Teamsters Union, 225 F. 2d 343, 348 (8th Cir. 1955)	15
NLRB v. Pennsylvania Greyhound Lines Inc., 303 U.S. 261 (1938)	13
NLRB v. Plumbers Union Local 457 299 F. 2d 497 (2d Cir. 1962)	13
NLRB v. Purity Food Stores, 376 F. 2d 497 (1st Cir.), cert. denied 389 U.S. 959 (1967)	15
NLRB v. Westinghouse Air Brake Co., 120 F. 2d 1004 (3d Cir. 1941)	13, 14
NLRB v. West Kentucky Coal Co., 152 F. 2d 198, 201 (6th Cir. 1945) cert. denied 328 U.S. 866 (1946)	12

Table of Citations.

CASES — PAGE

Paxton Wholesale Grocery Co., 123 N.L.R.B. 316 (1959) 14

Pittsburgh Plate Glass Co. v. NLRB 313 U.S. 146, 154 (1941) 7

Sav-On Drugs Inc., 138 N.L.R.B. 1032 (1962) 14

The Ideal Electric and Mfg. Co., 134 N.L.R.B. 1275 (1961) 15

STATUTES

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., § § 151, et seq.)

Section 7 4

Section 8 (a) (1) (5) 4

Section 9 (a), (b) 5

Section 10 (c) 5

Appendix:

Opinion of the United States Court of Appeals for the Third Circuit filed March 4, 1968 17

Decree dated June 24, 1968 26

Supplemental Decision of the National Labor Relations Board issued February 24, 1967 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. .....

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

The Western and Southern Life Insurance Company, petitioner, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 24, 1968, which directed enforcement of the Board's order, as modified.

OPINIONS BELOW

The chronological order of the opinions in the instant proceeding is as follows:

The majority Decision and Direction of Election of the Board in the representation proceeding (R. 3a-8a),[1] including the dissent of Members Rodgers and Leedom, is reported at 138 N.L.R.B. 538 (1962). The Board's Decision and Order in the subsequent unfair labor practice proceeding (R. 9a-10a), Members Rodgers and Leedom dissenting, is reported at 142 N.L.R.B. 28 (1963). The Board's Order was enforced by the Circuit Court in a per curiam opinion 328 F.2d 891 (3rd Cir. 1964). Certiorari was granted by the Supreme Court which remanded the case to the Third Circuit [380 U.S. 522 (1965)], with instructions to remand to the Board for further proceedings consistent with the Supreme Court's opinion in *NLRB v. Metropolitan Life Ins. Co. (Woonsocket),* 380 U.S. 438 (1965). The Board's Supplemental Decision and Order (Appendix p. 28 infra) is reported at 163 N.L.R.B. No. 14 (1967). The opinion of the Court of Appeals (Appendix p. 17 — infra) granting enforcement of the Board's order is reported at 391 F.2d 119 (3d Cir. 1968). The decree of the Court of Appeals (Appendix p. 26 infra) was entered on June 24, 1968.

---

1. "R" references are to the Joint Appendix to the Briefs of the parties in the Court below.

JURISDICTION

The decree of the Court of Appeals (Appendix p. 26 infra) was entered on June 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Where the Supreme Court granted certiorari and the case was remanded to the Board for further proceedings consistent with the Court's Opinion in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965) and the Board did not reopen the underlying representation case but ordered the parties to file briefs directed to the unit issues, holding it could articulate its reasons for unit determination in the unfair labor practice proceeding as well as it could in the representation proceeding, was the procedure followed by the Board a denial of due process and contrary to the Supreme Court's order?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §151 et seq.) are as follows:

"Sec. 7. — Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * * * * *

"Sec. 8 — It shall be an unfair labor practice for an employer —

(a) (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(a) (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * * * *

Statute Involved.

"Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * * * *

"Sec. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *"

STATEMENT OF THE CASE

The Petitioner, the Western & Southern Life Insurance Company, is an Ohio corporation with its home office located in Cincinnati, Ohio. It is engaged in the sale and servicing of ordinary and debit life insurance policies and health and accident insurance policies. It has offices located in twenty-three states. (R. 23a).

The Company's operations are highly standardized and centralized. For administrative purposes, the Company is divided into seven regions and fourteen divisions, made up at the time of the representative hearing of 236 district offices plus some 109 detached offices. (R. 5a, 28a, 41a).

The Union initially tried to organize the Respondent's debit insurance agents in the Pittsburgh, Pennsylvania metropolitan area. When it was unsuccessful and could not obtain a sufficient showing of interest on this basis it filed separate petitions for each of two of the five district offices located in the metropolitan Pittsburgh area. (R. 1a, 4a, 6a, 111a-116a).

The above cases were consolidated for hearing, and the Board, Members Rodgers and Leedom dissenting, on September 12, 1962, issued its Decision and Direction of Election and directed separate elections for the debit insurance district agents at the Respondent's McKeesport and Wilkinsburg (Pittsburgh East) District Offices. (R. 3a-8a). This decision is reported at 138 N.L.R.B. 538 (1962).

After the Union was certified, the Respondent refused to bargain with it, claiming the Board's unit

determination was invalid and that the unit was not appropriate. In the ensuing unfair labor practice proceeding, the Board, with Members Rodgers and Leedom dissenting, found the Respondent in violation of Section 8a (1) and (5) of the Act.[2] (R. 9a-10a). This decision is reported at 142 N.L.R.B. 28 (1963).

The United States Court of Appeals for the Third Circuit granted enforcement of the Board's Order in a per curiam opinion, 328 F.2d 891, entirely on the basis of its decision in *Metropolitan Life Insurance Company v. NLRB,* decided February 18, 1964, and reported at 328 F.2d 820.

Thereafter, Respondent filed with the Supreme Court of the United States a petition for a writ of certiorari. On April 26, 1965, the Court granted certiorari, (380 U.S. 522) vacated the judgment of the Circuit Court and remanded the case to the Circuit Court with instructions that it be remanded to the Board for further proceedings consistent with the opinion of the Supreme Court in *NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965).

On May 4, 1965, the Circuit Court vacated its decree and remanded the case to the Board consistent with the Supreme Court's opinion in the *Metropolitan* case *supra.*

---

2. The 8 (a) (1) violation was purely derivative because it was necessary for the petitioner to commit an alleged technical violation of Section 8 (a) (5) in order to test the validity of the units. See *American Federation of Labor v. NLRB,* 308 U.S. 401, 411 (1940); *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 154 (1941).

On August 8, 1966, the Board issued an order in the unfair labor practice case (6-CA-2625) inviting the parties to file briefs directed to the unit issues of this case in light of the Supreme Court's opinion in the *Metropolitan* case but added, "and the Board's Supplemental Decision and Order in *Metropolitan Life Insurance Company (Woonsocket, R. I.)*, 156 N.L.R.B. No. 113" (p. 1408) (1966).

Briefs were filed by the Respondent and General Counsel. Thereafter, the Board issued its Supplemental Decision and Order which reaffirmed its prior Order of April 16, 1963 (142 N.L.R.B. 28). The Board's Supplemental Decision dated February 24, 1967, is reported at 163 N.L.R.B. No. 14.

The United States Court of Appeals for the Third Circuit granted Enforcement of the Board's Order. The Opinion of the Court of Appeals (Appendix p. 17 — infra) is reported at 391 F.2d 119 (3d Cir. 1968). The decree of the Court of Appeals was entered on June 24, 1968.

REASONS FOR GRANTING THE WRIT

The decision of the Board, as enforced by the Court, raises important questions affecting due process, its compliance with the Supreme Court's order, and the proper administration of the National Labor Relations Act which should be reviewed by the Supreme Court.

1. The Board's Procedure and Supplemental Decision Was a Denial of Due Process and Contrary to the Supreme Court's Order.

After the Board in the *Quaker City Life Insurance Company* case 134 N.L.R.B. 960, enf'd. 319 F.2d 690 (4th Cir. 1963), by a three to two majority abandoned its consistent policy of some 17 years, that a state-wide unit of insurance agents was the smallest unit appropriate for collective bargaining, a flood of representation and failure to bargain cases arose, of which the present proceeding is one.

On account of the Board's apparent inconsistent unit determinations in the insurance industry, its failure to articulate specific reasons for such determinations, and its failure to discuss what weight it gave to the extent of union organization, the Court of Appeals for the First Circuit denied enforcement of the Board's Order in *NLRB v. Metropolitan Life Insurance Co. (Woonsocket)*, 327 F.2d 906 (1st Cir. 1964).

In two other cases involving *Metropolitan Life Insurance Co.*, 138 N.L.R.B. 565 (1962) (Wilmington), and 138 N.L.R.B. 512 (1962) (Cleveland), the Third and Sixth Circuit Court of Appeals, respectively enforced the Board's Order, 328 F.2d 820 (3d Cir. 1964); 330 F.2d 62 (6th Cir. 1964).

Reasons for Granting the Writ.

In the instant proceeding the Third Circuit Court granted enforcement of the Board's Order (328 F.2d 891) in a per curiam opinion based entirely on its decision in the *Metropolitan* case (Wilmington) *supra.*

Certiorari was granted by the Supreme Court in each of the above cases and they were remanded to the respective circuit courts with directions to remand the cases to the Board for further proceedings consistent with the Supreme Court's opinion in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965).

After the present proceeding was remanded by the Third Circuit Court, the Board on August 8, 1966, ordered that the parties be afforded an opportunity to file briefs directed to the unit issues of this case in the light of the Supreme Court's opinion in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965), but added, "and the Board's Supplemental Decision and Order in *Metropolitan Life Insurance Company (Woonsocket, R.I.)*, 156 N.L.R.B. No. 113" (p. 1408) (1966).

In its Supplemental Decision in the *Metropolitan* case the Board held it could articulate its reasons in the unfair labor practice case, as well as in the representation proceeding, and this could be done without reopening any record. Accordingly, in the instant proceeding the Board did not reopen the record or articulate its reasons in the representation case but only issued a Supplemental Decision in the unfair labor practice case.

The Circuit Court upheld the Board on this point because it believed the Supreme Court in the *Metropolitan* case (380 U.S. 438) did not view it necessary for

the Board to reopen the representation proceeding, but merely required the Board to provide the courts with a complete presentation of the Board's rationale and supporting evidence in making these unit determinations. (Appendix p. 17)

It is submitted that when the Supreme Court in the *Metropolitan* case stated, "due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed" (380 U.S. 442, 443), it was speaking of the various representation cases and the Board's decisions in the same.

Moreover, while the Board may articulate its reasons by reference to other decisions or its general policies, it is essential that there be in existence a valid enforceable representation decision for respondent to be found guilty of not bargaining in violation of the same.

Under Section 10 (c) of the Act the Board has no power to issue an order unless upon the preponderance of the testimony it shall be of the opinion that the party named in the Complaint *has engaged* or *is engaging* in an unfair labor practice.

No such order could legally issue in the present proceeding until there was a valid enforceable representation decision of the Board certifying an appropriate unit and a *refusal thereafter* by the respondent to bargain followed by a charge and the issuance of a complaint and hearing thereon.

In an unfair labor practice proceeding where the defense to failure to bargain is based on the inappropri-

ateness of the bargaining unit, the appropriateness or validity of such unit must be determined by the Board's decision in the underlying representation case. This is demonstrated by the fact that the Trial Examiner in the unfair labor practice proceeding is bound by the Board's unit determination in the prior representation case. *NLRB v. West Kentucky Coal Co.*, 152 F.2d 198, 201 (6th Cir. 1945), cert. denied 328 U.S. 866 (1946); *Air Control Products Co. of St. Petersburg, Inc.*, 139 N.L.R.B. 413 (1962); *Esquire Inc.*, 109 N.L.R.B. 530, 539 (1954), enf'd. 222 F.2d 253 (7th Cir. 1955).

There was no valid or enforceable representation decision in the present proceeding, however, because the underlying representation decision had been remanded by this Court to the Board due to the Board's failure to articulate its reasons in support of such decision.

Therefore, no failure to bargain on the part of the Respondent has been shown because the only alleged failure occurred when the Respondent initially refused to bargain to contest the validity of the Board's unenforceable representation decision. This alleged failure to bargain occurred back on October 19, 1962. (R. 13a, 122a).

The Board's Supplemental Decision in the unfair labor practice proceeding, in which it attempted to validate its representation decision, was not issued until February 24, 1967.

Failure to bargain is not a continuing violation of the Act. *NLRB v. Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964); *Efco Manufacturing Inc.*, 108 N.L.R.B. 245 (1954).

Accordingly since failure to bargain is not a continuing violation the Board legally could not find the Respondent guilty of failure to bargain until after Respondent had the opportunity to comply with and had refused to comply with a valid representation decision of the Board.

Nor may the Board's ex post facto action be justified by its explanation in its Supplemental Decision in the *Metropolitan* case (156 N.L.R.B. 1408, 1410) that a representation proceeding is not a prerequisite to the validity of a bargaining order. The present case *is based on a representation proceeding*. Therefore, cases involving bargaining orders in unfair labor practice cases based on a complaint that the respondent dissipated the union's majority status or refused to bargain for other reasons not related to the instant proceeding are not apposite.

The right of the Respondent not to be found to have committed an unfair labor practice is a substantial right and depriving Respondent of this right is a violation of due process.

Such a right is a substantive one and this is demonstrated by the fact that Board orders to bargain will be reviewed and enforced, or set aside, in the courts although there is no allegation that the refusal to bargain is continuing and the matter has become moot. *Local 1976 Carpenters' Union v. NLRB*, 357 U.S. 93, 97, note 2 (1958); *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938); *NLRB v. Plumbers' Union Local 457*, 299 F.2d 497 (2d Cir. 1962); *NLRB v. Gen-*

eral Motors Corp., 179 F.2d 221 (2d Cir. 1950); *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004 (3d Cir. 1941).

Also, if the company should violate the Act in the future it could be made subject to a very broad order rather than to the customary narrow remedial order. *American Enka Corp. v. NLRB*, 119 F.2d 60 (4th Cir. 1941); *NLRB v. May Department Stores*, 154 F.2d 533 (8th Cir. 1946); *NLRB v. Charles R. Krimm Lumber Co.*, 203 F.2d 194 (3d Cir. 1953).

This loss of the right not to be in violation of the law clearly inflicts substantial injury upon the Respondent and the denial of the right is a deprivation of property without due process of law.

Finally the Board in its Supplemental Decision in the unfair labor practice case relied on subsequent decisions and policy in the retail chain field which were decided and adopted after its decision in the representation case.

At the time of the representation decision the Board's policy for retail chains was that, in the absence of unusual circumstances, the bargaining unit should embrace employees of all stores located within an employer's administrative division or geographic area. See *Daw Drug Co., Inc.*, 127 N.L.R.B. 1316 (1960); *Paxton Wholesale Grocery Co.*, 123 N.L.R.B. 316 (1959); *Father & Son Shoe Stores*, 117 N.L.R.B. 1479 (1957); *Food Fair Stores, Inc.*, 114 N.L.R.B. 521 (1955).

After its underlying representation decision in the present proceeding the Board changed its retail chain

policy. *Sav-On Drugs Inc.*, 138 N.L.R.B. 1032 (1962).[3] It is these subsequent decisions which the Board is attempting to utilize retroactively to support its representation decision. (See Footnote 8, Supplemental Decision, Appendix p. 31).

Any subsequent change in criteria or Board policy in regard to retail stores should not be applied retroactively by the Board in its attempt to validate its underlying representation decision (138 N.L.R.B. 538) in the instant proceeding. See *NLRB v. E. & B. Brewing Co.*, 276 F.2d 594 (6th Cir. 1960), cert. denied 366 U.S. 908 (1961); *NLRB v. Teamsters*, 225 F.2d 343, 348 (8th Cir. 1955); *The Ideal Electric and Manufacturing Co.*, 134 N.L.R.B. 1275 (1961).

If the Board wished to rely upon subsequent criteria or changed policy to support its prior representation decision, then it should have vacated its decision and order in the unfair labor practice case (142 N.L.R.B. 28) and reopened the representation proceeding.

Therefore, it is submitted that the Board's ex post facto action of attempting to validate a prior representation decision in its subsequent Supplemental Decision in the unfair labor practice proceeding was not only a denial of due process but contrary to the Supreme Court's Order.

---

3. The Board is encountering difficulty in enforcing its policy change in retail store units. Enforcement Denied in *NLRB v. Purity Food Stores*, 376 F.2d 497 (1st Cir. 1967), cert. denied 389 U.S. 959 (1967); *NLRB v. Frisch's Big Boy Ill-Mar Inc.*, 356 F.2d 895 (7th Cir. 1966).

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN G. WAYMAN
WILLIAM D. ARMOUR
FRANK W. ITTEL, JR.
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania
Counsel for The Western and Southern Life Insurance Co.

September 1968.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16621

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE WESTERN AND SOUTHERN
LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued October 3, 1967
Before STALEY, *Chief Judge,* MARIS and VAN DUSEN, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 4, 1968)

By STALEY, *Circuit Judge.*

This is a petition by the National Labor Relations Board for enforcement of its order requiring the Western and Southern Life Insurance Company (hereinafter "Company") to bargain with the certified bargaining representatives of the Company's debit insurance agents employed at two separate district offices. The Company's principal contention in refusing to bargain is that the Board's finding that the individual district

offices are appropriate bargaining units is arbitrary and without substantial evidence, and is, in fact, based upon the extent of organization of the unit employees in violation of § 9(c)(5) of the Act, 29 U.S.C. § 159(c)(5) (1964). We have thoroughly reviewed the entire record in this case, and we conclude that the Board did not abuse its discretion; its decision was not controlled by the extent of organization, but was based on permissible criteria, and it established the appropriateness of the units.

This is the second time that this case has been before us. In January, 1962, the Insurance Workers International Union filed separate petitions for the Company's McKeesport and Wilkinsburg district offices in Western Pennsylvania. The cases were consolidated for hearing and the Board, two members dissenting, directed separate elections for each office. 138 NLRB 538 (1962). After the Union won the elections, the Company refused to bargain on the basis that the Board's unit determinations were invalid; but in the ensuing unfair labor practice proceeding, the Board ordered the Company to bargain with the Union. 142 N.L.R.B. 28 (1963). We granted enforcement of the Board's order in a per curiam opinion, 328 F.2d 891 (C.A.3, 1964), on the basis of our opinion in Metropolitan Life Ins. Co. v. N.L.R.B., 328 F.2d 820 (C.A.3, 1964). Thereafter, certiorari was granted by the Supreme Court which remanded the case to this court, 380 U.S. 522 (1965), with instructions to remand to the Board for further proceedings consistent with the opinion in N.L.R.B. v. Metropolitan Life Ins. Co. (Woonsocket), 380 U.S. 438 (1965).

On remand, the Board ordered the parties to file briefs directed to the unit issues of the case in the light of the Supreme Court's opinion in the Metropolitan (Woonsocket) case and the Board's supplemental decision issued on remand therein. There the Board held that it was not necessary to reopen the record since it could articulate its reasons for the unit determination in the unfair labor practice proceeding as well as it could in the representation proceeding. Similarly, the Board did not reopen the underlying representation proceeding in this case. The Company argues that the Board's refusal to reopen denied it due process and was contrary to the Supreme Court's order.

The controlling mandate in Metropolitan (Woonsocket) does not support the Company's position. There, the Supreme Court, emphasizing that the Board "* * * must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it,'" noted:

> "Of course, the Board may articulate the basis of its order by reference to other decisions or its general policies laid down in its rules and its annual reports, reflecting its 'cumulative experience' * * * so long as the basis of the Board's action, *in whatever manner the Board chooses to formulate it, meets the criteria for judicial review.*" 380 U.S. at 443, note 6. (Emphasis supplied.)

The Board's detailed decision in this case certainly "meets the criteria for judicial review." Moreover, the Supreme Court's language in the above-quoted note indicates to us that the Court did not view it necessary for the Board to reopen the representation proceeding,

but merely required the Board to provide the courts with a complete presentation of the Board's rationale and supporting evidence in making these unit determinations. Here the Board has made such a presentation.

Moreover, it is difficult to perceive how the Company was prejudiced by the Board's refusal to reopen the representation proceeding. The Company presented a most complete and competent case at the original representation hearing, and its position there, i.e., that the district offices were not individually appropriate bargaining units, and that the appropriate unit would have been all the district offices in the Company's "Division E," or in Western Pennsylvania, or in the Pittsburgh Metropolitan Area, is precisely that advanced in its briefs to the Board on remand, and again in the appeal to this court. It is true that in the § 8(a) (5) proceeding, the Company offered proofs to show that the Board's unit determinations were based on the Union's "extent of organization" by showing that the Union solicited employees at other district offices in the Pittsburgh area prior to the time the Union petitioned for elections at the two offices certified by the Board. However, in reaching its Supplemental Decision, the Board considered the offers of proof as if they had been established, and still concluded that acceptance of this evidence would not have overturned the original unit determinations. We have done likewise. Thus there can be no prejudice on this basis, for the Company is availed of whatever benefit it would have obtained by proving the substance of its offers, without having had to produce the evidence.

Finding then that there is no defect in the procedure employed by the Board, we shall proceed to the central inquiry whether these unit determinations were proper. In our view, the issues whether the Board's decisions are supported by substantial evidence and whether the Board improperly allowed the "extent of organization" to control its decision are not divisible, but are controlled by the same evidence and considerations. As we held in Metropolitan Life Ins. Co. v. N.L.R.B., supra, "* * * the effect of 9(c) (5) is to require the Board to determine whether a unit is in and of itself appropriate, apart from the extent to which the employees are organized." 328 F.2d at 825-26. Of course we agree that the Board must not be permitted to evade "9(c) (5) by purporting to base its decision on other factors when in truth it has been controlled by the extent of employee organization." N.L.R.B. v. Sun Drug Co., 359 F.2d 408, 412 (C.A.3, 1966). We find that the Board's decision, incorporating by reference the reasoning in its Supplemental Decision in Metropolitan (Woonsocket), 156 NLRB 1408 (1966), has not based these unit determinations on the extent of employee organization, but on permissible nonorganizational factors.

The record in the representation hearing clearly supports the Board's essential findings of fact. Each of the Company's district offices functions as an entirely autonomous unit vis-a-vis the other Company district offices.[1] There is virtually no interchange of em-

---

1. We are not concerned here with the "detached" offices maintained at other places, which are controlled by district offices.

ployees between the district offices, no overlap of territories, nor any other type of communication or exchange between them. Under the strict hierarchy of authority established by the Company, the district office manager and his assistants function as the first line of management. Although their discretion is limited by the considerable final authority vested in their superior, the Division Superintendent, the Board drew a permissible conclusion from the record, including Company manuals, that the district managers have "considerable leeway within the broad outlines of company policy to implement" the Company's business program.

The Company argues that various less-than-statewide units, or its "Division E" which comprises virtually all of the offices in Pennsylvania, and some in Delaware, would be appropriate units, but that individual district offices were not appropriate. Suffice it to say that the units suggested by the Company would also appear to be appropriate. However, as we noted in Metropolitan, supra, applying the various permissible criteria, "* * * the Board could determine any number of appropriate units, comprising a given set of employees." 328 F.2d at 825. The only question before us is whether the instant district office units are appropriate, and we agree with the Board that they are appropriate.

Our inquiry would terminate at this point, were it not necessary under the peculiar circumstances of this case, to also determine whether or not the Board did not merely purport to rely on the factors indicating that individual district offices were appropriate units and instead relied on the extent to which the petitioning

Union had succeeded in organizing the Company's employees. For our purposes, we take it as established that prior to the Union's petition for elections in the two district offices, the Union had attempted to organize four of the Company's district offices in the Pittsburgh area, but had only succeeded in the two offices herein involved.

In determining the effect of this showing, it is important to recognize that "The extent to which the Union failed to organize should not determine the appropriateness of the group it did organize. To hold, that because the Union failed to organize on a broader basis, the smaller unit petitioned for is inappropriate, would be to penalize the Union for failing in an attempt to organize, which right is fundamental to the Act." Metropolitan, supra, 328 F.2d at 826. Of course, whether or not the petitioning Union was controlled by the extent of organization is not the issue. However, where it can be shown that a union has been campaigning in a broader area, and it subsequently petitions for only a smaller portion of the employer's employees, the Board should affirmatively indicate that its decision was not controlled by organization alone.

Here, coupled with the rationale of the decision of the Board in Metropolitan (Woonsocket), supra, incorporated in the Board's opinion by reference, we find that the Board has not violated the mandate of §9(c)(5). We think the Board's policy of presumptively finding a single district office an appropriate unit accords well with the policy of the Act, embodied in §§7 and 9(b), which directs the Board to choose bargaining units that "assure to employees the fullest freedom in exer-

cising the rights guaranteed by this Act." Obviously, the smaller the number of unit employees, the greater the importance of the individual employee and his vote.

However, the Company argues that the policy of the Act in fostering and stabilizing good industrial relations will not be promoted by this policy, because, inter alia, the Company is faced "with the absurd possibility of dealing with various unions in 236 different bargaining units." Of course, this view supposes that the only appropriate unit would be the single district office, and we have already indicated that groupings of such offices may well be found to be appropriate in other cases. However, that is not our case. The short answer is simply that the overriding policy of the Act is in favor of the interest in employees to be represented by a representative of their own choosing for the purposes of collective bargaining, and the Board was entitled to give this interest greater weight than that accorded to the employer in bargaining with the largest, and presumably most convenient possible unit. The fact that most elements of the Company's labor policy are controlled by the home office does not detract from this conclusion; aside from the fact that the district office unit is especially well equipped to deal with purely local grievances, there is nothing to prevent the local unit, or combined local units from negotiating directly with the home office.

Thus we find that the Board did not abuse its discretion in certifying the separate district offices herein involved, and did not give controlling weight to the extent to which the Union had organized the Company's employees. Moreover, we are satisfied that

the Board has sufficiently articulated the reasons for its unit determinations in compliance with the Supreme Court's mandate in Metropolitan (Woonsocket).

An appropriate order may be submitted by the Board.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 16,621
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
THE WESTERN AND SOUTHERN LIFE
INSURANCE COMPANY, Respondent

Present: STALEY, MARIS and VAN DUSEN, *Circuit Judges.*

DECREE

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, The Western and Southern Life Insurance Company, its officers, agents, successors, and assigns on February 24, 1967. The Court heard argument of respective counsel on October 3, 1967, and has considered the briefs and transcript of record filed in this cause. On March 4, 1968, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order, which order is modified as follows:

Section 2(a) of the order is hereby modified to read:

> "2. Take the following affirmative action, which it is found will effectuate the policies of the Act:
>
> "(a) Upon request, bargain collectively with the said certified Union as the exclusive representative of the employees in the units described above, with respect to rates of pay, wages, hours

of employment, or other conditions of employment; and embody in a signed agreement or agreements any understandings reached."

Paragraph two (2), following the preamble of the "APPENDIX NOTICE TO ALL EMPLOYEES," is hereby modified to read:

"WE WILL bargain collectively, upon request, with INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive bargaining representative of all employees in the bargaining units described below concerning rates of pay, wages, hours of employment, or other conditions of employment, and embody in a signed agreement or agreements any understandings reached."

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order, as modified, of the National Labor Relations Board in said proceeding be enforced, and that respondent, The Western and Southern Life Insurance Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order, as modified, contained.

BY THE COURT,

STALEY
Senior Circuit Judge

Dated: June 24, 1968

Supplemental Decision.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 6-CA-2625

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On September 12, 1962, the National Labor Relations Board issued a Decision and Direction of Elections in Cases Nos. 6-RC-3060 and 6-RC-3063, finding appropriate a unit of debit insurance agents at Respondent's McKeesport, Pennsylvania, district office and also finding appropriate a unit of debit insurance agents at Respondent's Wilkinsburg, Pennsylvania, office.[1] After elections were duly conducted on October 5, 1962, the Regional Director for Region 6 on October 15, 1962, certified Insurance Workers International Union, AFL-CIO, as the exclusive bargaining representative in each of these units. Thereafter, contending that the Board's unit determinations were erroneous and in order to test these determinations, Respondent refused to bargain with that Union in both units.

On February 13, 1963, Trial Examiner Alba B. Martin issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent, by refusing to bargain with the Union in each of these units, had violated Section 8(a)(5) and (1) of the National

1. 138 NLRB 538.

Labor Relations Act, as amended. On April 16, 1963, the Board issued a Decision and Order adopting the findings of the Trial Examiner and ordered Respondent to bargain, upon request, with the Union.[2] On March 4, 1964, the United States Court of Appeals for the Third Circuit issued its decision granting enforcement of the Board's Order.[3]

Thereafter, Respondent filed with the Supreme Court of the United States a petition for a writ of certiorari. On April 26, 1965, the Court granted certiorari,[4] vacated the judgment of the United States Court of Appeals for the Third Circuit, and remanded the case to the latter court with instructions that it be remanded to the Board for further proceedings consistent with the opinion of the Supreme Court in *N.L.R.B. v. Metropolitan Life Insurance Co.*, 380 U.S. 438.

In the *Metropolitan* case, the Board had likewise found appropriate a single district office unit of insurance salesmen and had directed that employer to bargain in that unit. Following a decision of the Court of Appeals for the First Circuit denying enforcement of the Board's order in that case, the Supreme Court had granted certiorari and issued its decision, *supra,* in which it vacated the judgment of the Court of Appeals and directed that the case be remanded to the Board for further proceedings "due to the Board's lack of articulated reasons for the decisions in and distinctions among the cases . . ."[5] involving unit determinations in

---

2. 142 NLRB 28.
3. 328 F. 2d 820.
4. 380 U.S. 522.
5. 380 U.S. 438, 442.

the insurance industry. Subsequently, the Board, on February 11, 1966, issued a Supplemental Decision and Order in the *Metropolitan* case, in which the Board more fully explicated the rationale underlying its original unit determination as well as its general policy for determining appropriate bargaining units in the insurance industry.[6]

Meanwhile, on May 4, 1965, the United States Court of Appeals for the Third Circuit entered an order remanding the present case for further proceedings consistent with the opinion issued by the Supreme Court in the *Metropolitan* case, *supra*. Thereafter, the Board, on August 8, 1966, issued an Order inviting the parties herein to file briefs directed to the unit issues of this case in the light of the Supreme Court's opinion in the *Metropolitan* case and the Board's subsequent decision in that same proceeding. Respondent and the General Counsel have filed briefs which the Board has duly considered.

---

6. *Metropolitan Life Insurance Company (Woonsocket, R. I.)*, 156 NLRB No. 113. After issuance of the decision in the cited case, the Board approved an agreement between that Company and the Union, whereby, *inter alia*, the Company agreed to recognize the Union in a unit of employees at the Company's district office in Woonsocket, R. I., as well as in units at other district offices of the Company. Order dated June 3, 1966, in *Metropolitan Life Insurance Co.*, Case No. 13-CA-5981 (not published in printed volumes of Board Decisions and Orders), 62 LRR 142. The Board thereupon, on the basis of the aforesaid agreement, dismissed the complaint and approved withdrawal of the unfair labor practice charges in *Metropolitan Life Insurance Co. (Woonsocket, R. I.)*, by Order dated June 17, 1966, (also not published in printed volumes of Board Decisions and Orders).

In accordance with the aforementioned court orders, the Board has reconsidered its original decision in the present case, its earlier decision in the underlying representation case, and the entire record in both proceedings. Having done so, the Board finds no reason to modify its holdings therein.

The refusal to bargain having been admitted, the only issue in the case is the appropriateness of the two units. Each is a unit of the Respondent's debit insurance district agents employed at a district office, one at McKeesport and the other at Wilkinsburg, Pennsylvania. Applying the Board's usual unit principles, it is clear that a district office unit is one which the Board will normally find appropriate as the insurance industry's analogue of the single manufacturing plant[7] or the single store of a retail chain.[8]

---

7. As the plant is the basic component of a manufacturing enterprise, and as Section 9(b) of the Act specifically recognizes the validity of such a unit, the Board has long held that a unit confined to a single plant of a particular employer is, presumptively, an appropriate unit. See, e.g., *Beaumont Forging Co.*, 110 NLRB 2200, 2201-2202; *Frederickson Motor Express Corp.*, 121 NLRB 32, 33.

8. In *Sav-On Drugs, Inc.*, 138 NLRB 1032, in which the Board found a single store to be an appropriate unit, the Board reconsidered its prior policy that the appropriate unit for retail chainstore operations should embrace employees of all stores within an employer's administrative division or geographic area. The Board concluded that the above-stated earlier policy "has overemphasized the administrative groupings of merchandising outlets at the expense of factors such as the geographic separation of the several outlets and the local managerial autonomy of the separate outlets . . . ."

We so held in our recent Supplemental Decision in *Metropolitan, supra,* and we affirm that policy determination here.[9]

In *Metropolitan,* the district office unit found appropriate functioned as a distinct entity within that employer's operations. That district office, along with other district offices, covered a delimited geographical area and was to a significant degree autonomous in its day-to-day operations. The district office manager supervised the so-called agency managers and they, in turn, exercised immediate control and supervision over the sales agents. The agents in each district office enjoyed common working conditions and benefits and provided service primarily to clients within their designated territories. There was almost no transfer or interchange of employees between district offices. Supervision of district offices was the responsibility of a Regional Manager. However, most of the Regional Manager's contact in each district office was with the district office manager and then primarily in respect to sales program development. Hence, insofar as the individual agents were concerned, it was their own district office manager, and not the Regional Manager, who was the principal representative of company authority, and policy. And it was the agency managers, working under

---

See, also, *Primrose Super Market of Salem, Inc.,* 148 NLRB 610, enforced by unpublished order on April 7, 1965 (C.A. 1), cert. denied 382 U.S. 830, rehearing denied, 353 F. 2d 675 (C.A. 1); *The J. L. Hudson Company,* 155 NLRB No. 133; *J. W. Mays, Inc.,* 147 NLRB 968.

9. We also incorporate by reference herein the rationale of that decision.

the direction of the district office manager, who transmitted and explained company policy to the agents through meetings and conferences and who reviewed each agent's performance with him.

Reexamination of the record herein reflects that Respondent's district office organization is very similar to that of the district office in the *Metropolitan* case. Thus, here, as in *Metropolitan*, the district office is a separate administrative entity through which the Respondent conducts its business operations. Each district office has a district sales manager in charge who is the immediate supervisory authority for the agents assigned to that office. Several associate sales managers assist the manager in carrying out this responsibility. All agents are required to perform their duties subject to the supervision and instruction of the associate sales managers and the district sales manager. Each district office sales force operates in its own distinct geographical area, and there is no interchange, and virtually no transfers, of agents between district offices. Labor relations policies are established by the Respondent's home office in Cincinnati, Ohio, and all agents work under the same wage policies and have the same employee benefits and working conditions.[10] The next level of organization above the district offices here involved is Respondent's Division "E", of which Superintendent of Agencies Maly is in charge. This division comprises some 15 district offices (including the offices here involved at McKeesport and Wilkinsburg) and six detached offices; it covers most of the State of Pennsyl-

---

10. There is no bargaining history for the employees involved in this proceeding.

vania and part of the State of Delaware. Maly, who maintains his office in Philadelphia, several hundred miles away from McKeesport and Wilkinsburg, oversees the operations of all offices within his division, and either he or his assistant visits each such office several times a year.[11]

Notwithstanding the foregoing, Respondent contends that district office units at McKeesport and Wilkinsburg are inappropriate. It argues that when the Board originally determined these units to be appropriate it did not follow its then existing unit principles. It avers that if the Board now reaffirms these unit findings it could only be on the basis of a retroactive application of a recent change in the Board's policy. It further argues that these unit findings must fall, in any event, because they rest ultimately upon the Union's "extent of organization", thus violating the provisions of Section 9(c) (5) of the Act which limit the Board's authority in making unit determinations. Respondent also advances the affirmative contention that the appropriate unit should instead consist of all the district offices in its Division E, or, alternatively, all its district offices in western Pennsylvania or in the Pittsburgh metropolitan area. Lastly, Respondent argues that single district office units at McKeesport and Wilkinsburg are inappropriate essentially for the reason that the operations of the district offices in its Division E

---

11. The facts concerning the Pittsburgh and McKeesport district offices and Respondent's organizational structure and administrative policy are set forth in more detail in the decision in the representation case, 138 NLRB 538. Based on our reexamination of the record in that proceeding, we reaffirm those findings.

are so closely controlled by Superintendent Maly that, individually, they do not constitute autonomous administrative units. We reject all these arguments as lacking in merit.[12]

Contrary to Respondent, the Board's original unit findings in the underlying representation case here were founded upon its policies as they existed at that time—in 1962—and continue to exist at the present time. As more fully explained in the supplemental *Metropolitan* decision,[13] the Board has, since its *Quaker City Life Insurance Company*[14] decision, consistently applied to the insurance business the same unit rules it has applied

---

12. Respondent also contends that the Board has prejudged its present decision in this case, contrary to the remand orders of the Supreme Court and the Court of Appeals for the Third Circuit. In support of this contention, Respondent adverts to the Board's Supplemental Decision in *Metropolitan, supra,* and particularly to a reference the Board made therein to cases (including the underlying representation case here) where the Board had found single district offices to be appropriate units in the insurance industry.

Respondent's contention in this regard is without foundation, because it is bottomed upon a reading of the foregoing reference out of its context. An examination of the reference in the full context in which it appears readily shows that the Board was merely pointing out the historical fact that it had, at the *initial stage* of this proceeding and in numerous others like it, determined that single district office units were appropriate in this industry. See 156 NLRB No. 113 (text following footnote 20).

13. Id.

14. 134 NLRB 960, issued on December 15, 1961.

to other industries.[15] The Board's decision in the representation case here applied these normal unit rules and was issued by the Board 9 months after *Quaker City* was decided.[16]

The short answer to Respondent's contention that the Board's original unit findings here were based on the Union's "extent of organization" is that it is without foundation. We have reexamined the transcript of the record in that case, in which all the witnesses were presented by the Respondent, and are unable to find any evidence bearing on this factor. Respondent itself was apparently aware that such evidence was lacking in the representation case, for it sought at the subsequent Section 8(a) (5) proceeding to introduce testimony bearing on the Union's organizational campaign. The Trial Examiner, however, sustained an objection to such testimony. Respondent thereupon made offers of proof, the substance of which were that the Union had sought to organize four of its district offices in the Pittsburgh area but had apparently succeeded only in organizing the two offices involved herein. The Trial Examiner also rejected the offers of proof.

In its present brief, Respondent, relying on its offers of proof in the Section 8(a) (5) proceeding, again advances its contention that the Board's determination in the representation case was based upon the Union's "extent of organization".

---

15. Prior to *Quaker City*, the Board applied special rules in making unit determinations in this industry. A history of the development of these rules and their eventual rescission is also set forth in the Supplemental Decision in *Metropolitan*.

16. 138 NLRB 538, issued on September 12, 1962.

However, accepting such proffered evidence as proof, it would not change our original unit findings. Respondent's view seems to be that, if it can succeed in establishing that the Board's unit finding coincided with the Union's "extent of organization", such findings automatically become anathema by the force of Section 9(c) (5) of the Act. Respondent's view, however, misapprehends the thrust of this statutory provision. For, as the Supreme Court pointed out in ***N.L.R.B. v. Metropolitan Life Insurance Company***, "both the language and the legislative history of Section 9(c) (5) demonstrate that the provision was *not* intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination".[17] Stated otherwise, that provision was merely intended to preclude the Board from basing its unit determination *solely* on "extent of organization" in the absence of other criteria of appropriateness.[18] It was not intended to prohibit the Board from considering "extent of organization" as *one* factor in its determination or to invalidate units which have qualified under other established tests for appropriateness irrespective of "extent of organization". The Board's original unit determinations here rested upon such *other* established tests for appropriateness. Hence, if we were to accept Respondent's offer

---

17. 380 U.S. 431, 441-442. Emphasis supplied.

18. 156 NLRB No. 113 (p. 7). Section 9(c) (5) provides:

> In determing whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

of proof, the proffered evidence would not serve to overturn these original unit determinations. Rather, it would provide additional support for such determinations.

Respondent, as noted, further contends that some combination of its district offices—Pittsburgh area, western Pennsylvania area, or all of its Division E—would be more appropriate than a single district office unit at McKeesport and another single district office at Wilkinsburg. Respondent also objects that the Board, in reaching its decision in the representation proceeding, neglected to answer Respondent's contentions in respect to one of these alternatives. These arguments by Respondent misconstrue the Board's authority under the Act to determine bargaining units. There is nothing in the Act which requires that the unit for bargaining be the only appropriate unit. The Act requires simply that the unit be "appropriate" to insure to employees in each case the fullest freedom in the exercise of their rights guaranteed by the Act.[19] Hence the Board did not, in the representation case, and need not now, decide that district office units are the *only* appropriate units of Respondent's employees. Likewise the Board did not previously, and need not now, decide that the alternative units advanced

---

19. E.g., *A. S. Beck Shoe Corporation*, 92 NLRB 1457, 1459; *General Instrument Corp. v. N.L.R.B.*, 319 F. 2d 420, 422-423 (C.A. 4), certiorari denied, 375 U.S. 966; *Mountain States Telephone and Telegraph Co. v. N.L.R.B.*, 310 F. 2d 478, 480 (C.A. 10); *N.L.R.B. v. Smythe*, 212 F.2d 664, 667-668 (C.A. 5); *Harris Langenberg Hat Co. v. N.L.R.B.*, 216 F.2d 146, (C.A. 8); *Mueller Brass Co. v. N.L.R.B.*, 180 F.2d 402, 405 (C. A. D.C.).

by Respondent are inappropriate. Applying our usual principles, we hold merely as we have in other similar cases, that a district office unit is presumptively an appropriate unit in this industry.

We further hold that there is no factual basis in this case for rebutting the presumption that each of the two units here involved,—one at McKeesport and the other at Wilkinsburg—is appropriate.[20]

The Respondent argues, however, that, unlike the normal situation in the insurance industry, its district offices within Division E are not individually appropriate units for the reason that their operations are so closely controlled by Division E's Superintend-

---

20. Consistent with the foregoing, and as more fully explained in the Supplemental Decision in *Metropolitan,* a unit composed of two or more district offices may also be appropriate, if there is a reasonable degree of geographic coherence among the offices and if other factors support the combination. In such cases—where either the district office or a combination of offices might be appropriate on the basis of factors other than "extent of organization"—the Board will take the Union's request into account in deciding in which unit an election should be conducted. For there is little justification in requiring that adjacent offices, sought by the same labor organization, be in different bargaining units where a combination would also be appropriate. On the other hand, although other rational groupings of offices may be possible, there is no reason to compel a labor organization to seek representation in a unit other than the one requested unless the requested unit is itself inappropriate. See *Metropolitan, supra,* 156 NLRB No. 113; *Dixie Belle Mills, Inc.,* 139 NLRB 629, 631; *P. Ballantine & Sons,* 141 NLRB 1103. 1107; *Baadad Copper Co.,* 144 NLRB 1496; *Gordon Mills, Inc.,* 145 NLRB 771, 773-774.

ent Maly as to preclude them from separately constituting autonomous administrative entities. Thus, Respondent points out that Maly is the official with final authority to hire, discharge, promote, and demote agents in Division E; that it is he who determines to establish debits within an office and to set up new detached offices; that he or his assistant makes frequent visits to all offices within Division E; that he is responsible for training of new agents, that he issues promotional material; that he supervises production, election, and the servicing of policies; and that he is charged with responsibility for making certain that Respondent's uniform rules and procedures, as set forth in its various manuals,[21] are carried out. While the record largely supports these contentions by Respondent concerning the extent of Maly's authority, we are not persuaded that the possession and exercise of such authority within the framework of Respondent's organizational structure requires us to overturn the Board's original conclusion—on which its unit findings were largely based—that each district office is, in effect, a "... separate administrative entity through which the Employer conducts its business operations ...."[22] For, although Maly and his assistant *oversee* the aforementioned operations, it is the district sales manager and his associate sales managers who responsibly *carry out* these functions. Moreover, the record indicates that the district office's management has considerable leeway within the broad

---

21. The Manual for Fieldmen, the Manager's Manual, and the Ordinary Rate Book.

22. 138 NLRB at pp. 539-540.

lines of company policy to implement on a day-to-day basis Respondent's overall business program.[23]

Thus, although Maly has the final say in the hiring of an agent, the district office management does the recruiting, obtains completion of the personnel forms, and makes the recommendation. If hired, the new agent signs a contract which explicitly binds him to "...Be subject to the supervision and instruction of his associate sales manager and his district sales manager". Upon execution of the contract the new agent is then appointed to a particular district and, again by the explicit terms of his agreement, "accepts his appointment as district agent to represent the Company in such district".

Although Maly supervises the 26-week training period of new agents—in that he maintains a training "Progress Book" and follows training activities through correspondence and occasional consultation with dis-

---

23. The considerable authority of the district manager and his associate is summed up in Respondent's Manager's Manual (p. 1) in the following manner:

> District Sales Managers and Associate Sales Managers are appointed by the Home Office and are responsible for the management of their district and staff beginning on the date of their appointment or transfer....
>
> As a District Sales Manager, you have the responsibility for the overall supervision of the business and the men in your District. The Associate Sales Managers are your assistants and they in turn are responsible for the success of their staffs. However, the overall responsibility rests upon the District Sales Manager....

trict office personnel—the agent's actual training is carried out, according to Respondent's Manager's Manual, ". . . with the constant help and supervision of his district sales manager and his associate sales manager". The managers and associate managers also give and grade tests for new agents and prepare them to pass the State insurance examination.

While promotions, demotions, and discharges are finally determined by Maly, his action in each instance is taken upon consideration of the recommendation of the district manager. Debits are established or changed in the same fashion. Further, as to discharges, a frequent procedure followed by Respondent in obtaining an agent's separation is to have the district manager persuade the agent to resign.

Although Maly, through the examination of periodic reports, keeps a watchful eye on other operations, such as sales, production, collections, and servicing of policies, the actual responsibility for their proper performance is lodged in the district manager and his staff. The applications for new business are submitted by an agent to his district office and reviewed by the manager of that office before forwarding to the home office. Moneys collected by the agents are deposited and accounted for in the district office. The various forms and papers needed for servicing policies are submitted to district office management and usually to the associate manager. These include forms for transfer, cancellation, lapse, or change of insurance policies and cash surrender papers. As for Respondent's overall production program, its Manager's Manual recites that "To the District Sales Manager falls the *entire* responsibility of oversee-

ing his District's production and conservation effectiveness". [Emphasis supplied.]

From the above, and contrary to Respondent's contention, it seems clear to us that each district office under the direction of its district manager operates in a manner demonstrating a significant degree of local autonomy.[24] While Maly and his assistant oversee these operations, the control and supervision which they exercise seems to us little different from the control and supervision exercised by intermediate higher management of any well run enterprise over its field operations. Maly's authority appears in fact to be similar to the authority exercised by the Regional Manager in *Metropolitan, supra.*[25] The existence of such authority, however, does not render inappropriate an otherwise appropriate unit of employees working at a lower echelon, particularly where, as here,[26] the supervision of that lower

---

24. We are thus unable to accord much weight to the conclusionary testimony of Respondent's Vice President Roth at the hearing in the representation case that each district offiice is not an autonomous operation.

25. For a discussion of the functions of the Regional Manager in that case see 156 NLRB No. 113, and Trial Examiner's Decision therein "section III".

26. We deem it significant in the present case that Maly and his assistant found it necessary to make only occasional visits—averaging less than one visit per month—to McKeesport and Wilkinsburg during the year preceding the hearing in the representation case. Thus the record shows that Maly made four trips to the McKeesport office—each on a 1-day duration—and his assistant made one visit to McKeesport remaining there for 3 days at that time. During the same period

echelon has a meaningful degree of autonomy in carrying out its day-to-day activities.[27]

The record therefore amply supports the subsidiary conclusion, which the Board reached in the underlying representation case[28] and which we here reaffirm, that each individual district office of the Respondent, at least within its Division E, is, in effect, ". . . a separate entity through which the Employer conducts its business operations".

For these reasons, after reexamining the full record of these proceedings, we reaffirm the Board's earlier findings that all debit insurance district agents at Respondent's McKeesport, Pennsylvania, district office and all debit insurance district agents at Respondent's Wilkinsburg, Pennsylvania, district office separately constitute appropriate bargaining units for the purposes of the Act, and we also reaffirm the Board's earlier finding that by refusing to bargain with the Union in these units, Respondent has violated Section 8(a)(5) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Western and Southern Life Insurance Company, McKeesport and Wilkinsburg, Pennsylvania, its officers, agents, successors, and assigns, shall:

Maly visited the Wilkinsburg office seven times and his assistant visited it four times.

27. 138 NLRB at pp. 539-540.

28. 138 NLRB at pp. 539-540.

1. Cease and desist from:

(a) Refusing to bargain collectively with Insurance Workers International Union, AFL-CIO, as the duly certified exclusive bargaining representative of its employees in the following units.

All debit insurance district agents at Respondent's district office in McKeesport, Pennsylvania, excluding plant clerical and office clerical employees, inspectors, managers, assistant managers, guards, professional employees, and all supervisors as defined in the Act.

All debit insurance district agents at Respondent's district office in Wilkinsburg, Pennsylvania, excluding plant clerical and office clerical employees, inspectors, managers, assistant managers, guards, professional employees, and all supervisors as defined in the Act.

(b) Interfering with the efforts of the Insurance Workers International Union, AFL-CIO, to negotiate for or represent the employees in the said appropriate units as the exclusive bargaining agent.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the said certified Union as the exclusive representative of the employees in the units described above, with respect to grievances, labor disputes, rates of pay, wages, hours of employment, and other conditions of work; and embody in a signed agreement or agreements any understandings reached.

(b) Post at its district offices in McKeesport and Wilkinsburg, Pennsylvania, copies of the attached no-

tice marked "Appendix".[29] Copies of said notice, to be furnished by the Regional Director for Region 6, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman
JOHN H. FANNING, Member
GERALD A. BROWN, Member
HOWARD JENKINS, JR., Member
SAM ZAGORIA, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

---

29. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interfere with the efforts of the INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, to negotiate for or represent the employees in the said appropriate units as the exclusive bargaining agent.

WE WILL bargain collectively, upon request, with INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive bargaining representative of all employees in the bargaining units described below concerning grievances, labor disputes, wages, rates of pay, hours of employment and other conditions of work, and embody in a signed agreement or agreements any understandings reached.

All debit insurance agents at our district office in McKeesport, Pennsylvania, excluding plant clerical and office clerical employees, inspectors, managers, assistant managers, guards, professional employees, and all supervisors as defined in the Act.

All debit insurance agents at our district office in Wilkinsburg, Pennsylvania, excluding plant clerical and office clerical employees, inspectors, managers, assistant managers,

guards, professional employees, and all supervisors as defined in the Act.

THE WESTERN AND SOUTHERN
LIFE INSURANCE COMPANY
(Employer)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222 (Tel. No. 644-2977), if they have any questions concerning this notice or compliance with its provisions.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 535

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. After a hearing on the Union's [1] petitions for elections among the debit insurance agents employed in two of petitioner's district offices in western Pennsylvania, the Board found that each office constituted an appropriate bargaining unit (138 N.L.R.B. 538). The Union was certified as bargaining representative following elections in which it received a majority vote

[1] Insurance Workers International Union, AFL-CIO.

of the agents in each office (J.A. 117a-120a).[2] Thereafter, the Company refused to bargain with the Union on the ground that the Board had improperly determined that the individual district offices constituted appropriate units for collective bargaining (J.A. 120a-122a, 103a). In the subsequent unfair labor practice proceeding, the Board rejected the Company's challenge to the prior unit designation and found that the Company's admitted refusal to bargain with the Union violated Sections 8(a)(5) and (1) of the Act (142 N.L.R.B. 28; J.A. 9a-17a, 3a-8a). The court of appeals affirmed *per curiam* (328 F.2d 891 (C.A. 3)). On April 26, 1965, shortly after this Court's decision in *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, the Company's petition for a writ of certiorari was granted, and the judgment of the court of appeals was vacated and the case remanded with instructions to remand it to the Board for further proceedings consistent with the opinion in *Metropolitan* (380 U.S. 522).

Pursuant to the remand, the Board invited the parties to file briefs on the unit issue in the light of this Court's opinion in *Metropolitan* and the Board's supplemental decision on remand in that case (Pet. App. 30, 19).[3] The Board issued a supplemental decision

---

[2] "J.A." refers to the Joint Appendix to the briefs in the court below.

[3] In *Metropolitan*, the Court held that the Board's district-office unit determination could not properly be reviewed "due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases * * *." (380 U.S. at 442), and directed that the case be remanded to the Board for fur-

and order, reaffirming its original unit determination and its conclusion that the Company had unlawfully refused to bargain with the Union in the designated units (Pet. App. 30-31, 44). The Board noted that in its supplemental decision in *Metropolitan* it had concluded that "a district office unit is one which the Board will normally find appropriate as the insurance industry's analogue of the single manufacturing plant or the single store of a retail chain" (Pet. App. 31). The Board found that the facts in the present case were similar to those in *Metropolitan* and that there was no reason to depart from the unit standards enunciated in that case (Pet. App. 32-34).

The court of appeals held that the Board had complied with the terms of the remand (Pet. App. 19-20), that the Board was not required to reopen the underlying representation proceeding (Pet. App. 20), and that the Board did not abuse its discretion in certifying the Union to represent petitioner's employees in the two district-office units (Pet. App. 21-24). Accordingly, the court enforced the Board's order directing petitioner, upon request, to bargain with the Union in the designated units (Pet. App. 26-27, 44-48).

2. Petitioner does not challenge the Board's unit determinations on the merits. The only question presented is whether the Board accorded petitioner due

---

ther proceedings. The Board subsequently issued a supplemental decision in *Metropolitan*, articulating its reasons for finding a single, district-office unit appropriate (*Metropolitan Life Insurance Co. (Woonsocket, R.I.)*, 156 NLRB 1408 (1966), and the case was thereafter settled by agreement of the parties (Pet. App. 30, n. 6).

process and complied with the terms of this Court's remand by permitting the parties to file briefs on the unit issue in the unfair labor practice proceeding, instead of reopening the original representation proceeding, articulating its unit standards there, and then affording petitioner a second opportunity to refuse to bargain with the Union (Pet. 11-15).

The court below properly observed that this Court's remand in *Metropolitan* did not require the Board to follow any particular procedure, but merely "to provide the courts with a complete presentation of the Board's rationale and supporting evidence in making these unit determinations. Here the Board has made such a presentation" (Pet. App. 19-20). Moreover, petitioner was not prejudiced by the Board's failure to reopen the representation hearing. As the court below added (Pet. App. 20), the "Company presented a most complete and competent case at the original representation hearing, and its position there * * * is precisely that advanced in its briefs to the Board on remand, and again in the appeal to this court."[4]

The procedure followed by the Board, moreover, was fully consistent with the statutory scheme. In the circumstances of this case, "The unit proceeding and [the] complaint on unfair labor practices are

---

[4] In the original unfair labor practice proceeding, the Company sought to introduce evidence showing that the Board's unit determinations were coextensive with the Union's "extent of organization." On remand, the Board accepted the Company's offer of proof with respect to this evidence, thereby treating it as though it had been established, but concluded that it did alter the propriety of its unit determinations (Pet. App. 20, 36-38).

really one." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158. In view of the fact that petitioner persisted in its refusal to bargain after the Board had reaffirmed its district-office unit standards in the supplemental decision in *Metropolitan* (note 3, *supra*), petitioner should not be permitted to escape the consequences of its deliberate conduct until after the Board had reopened the representation proceeding and reaffirmed its unit determinations, and the Union had been forced to engage in the futile act of again asking the Company to honor the Board's certification.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

OCTOBER 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 322127 248